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No. 88-1055

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL E. YEAUGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16

QUESTION PRESENTED

Whether the admission during the government's case-in-chief of the out-of-court statement of a declarant who testified during the defense case violated the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Douglas v. *Alabama*, 380 U.S. 415 (1965)	10
Lee v. *Illinois*, 476 U.S. 530 (1986)	2, 10
Nelson v. *O'Neill*, 402 U.S. 622 (1971)	10
Ohio v. *Roberts*, 448 U.S. 56 (1980)	10
United States v. *Cordero*, 22 M.J. 216 (C.M.A. 1986)	2
United States v. *Inadi*, 475 U.S. 387 (1986)	10
United States v. *Owens*, 108 S. Ct. 838 (1988)	10

Constitution, statutes and rules:

U.S. Const.:	
Amend. V (Due Process Clause)	9
Amend. VI (Confrontation Clause)	9, 10, 12
Uniform Code of Military Justice:	
Art. 74(a), 10 U.S.C. 874(a)	2
Art. 81, 10 U.S.C. 881	2
Art. 86, 10 U.S.C. 886	2
Art. 107, 10 U.S.C. 907	2, 6
Art. 121, 10 U.S.C. 921	2
Art. 134, 10 U.S.C. 934	2
Fed. R. Evid. 803(24)	5
Mil. R. Evid. Rule 803(24)	5, 7, 9

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 27 M.J. 199. The opinions of the Navy-Marine Corps Court of Military Review (Pet. App. 10a-19a and 20a-29a) are reported at 24 M.J. 835 and 20 M.J. 797.

JURISDICTION

The judgment of the Court of Military Appeals was entered on October 24, 1988. The petition for a writ of certiorari was filed on December 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial on three

specifications of conspiracy to commit larceny, three specifications of larceny, one specification of receipt of stolen property, and one specification of unauthorized absence, in violation of Articles 81, 121, 134, and 86 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 921, 934, and 886. Petitioner was sentenced to confinement for 20 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence. While this case was on appeal, the Secretary of the Navy, pursuant to Article 74(a), UCMJ, 10 U.S.C. 874(a), agreed with a recommendation of the Naval Clemency and Parole Board and reduced petitioner's term of confinement to ten years. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. Pet. App. 20a-29a. The Court of Military Appeals vacated the judgment of the court of military review and remanded the case to that court for reconsideration in light of *Lee* v. *Illinois,* 476 U.S. 530 (1986), and *United States* v. *Cordero,* 22 M.J. 216 (C.M.A. 1986). On reconsideration, the court of military review again affirmed. Pet. App. 10a-19a. The Court of Military Appeals again granted review and affirmed. Pet. App. 1a-9a.

1. The charges against petitioner arose from his participation in two larcenies against military club facilities at which petitioner or his wife, Marine Corps Corporal Lynne Yeauger, worked. The thefts occurred at Camp Pendleton, California, on September 21 and October 19, 1981, and resulted in a loss of approximately $11,000. Marine Sergeant Ervin Callahan, an assistant manager at the club, helped petitioner commit the crimes.[1] Petitioner

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[1] Callahan was tried first and was convicted of conspiring to commit larceny at Camp Pendleton. Petitioner's wife pleaded guilty to two

and Callahan committed the first larceny as follows: In the early morning hours of September 21, the two went to the club, opened the safe, and took the money. Petitioner then handcuffed Callahan to a stall in the bathroom, left the club, and returned an hour later. Petitioner then claimed that he discovered Callahan, who asserted that he was the victim of an armed robbery. Petitioner and Callahan later split the proceeds from the larceny. Pet. App. 14a; Tr. 141-142. Petitioner and Callahan committed the second Camp Pendleton theft in a different manner. After letting themselves into the club, they used a blowtorch to open the safe, in order to leave the impression that the crime was committed by someone without access to the safe. This time, Callahan did not receive his full share of the proceeds until much later, because he was under investigation for the earlier larceny. Pet. App. 14a; Tr. 142-147, 208-209.[2]

The following year petitioner and his wife were given a routine reassignment to the Marine Corps facilities at Jacksonville, North Carolina. Petitioner's wife worked at the New River Enlisted Club, and petitioner worked at various enlisted clubs at Camp Lejeune. Tr. 144-146.

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larcenies committed at military clubs in North Carolina and to making a false statement to military authorities. She testified as a prosecution witness at petitioner's trial. Pet. App. 3a, 4a.

[2] Callahan gave the Naval Investigative Service agents inconsistent statements regarding the number, race, and appearance of the two persons who had allegedly robbed him on September 21. Tr. 36. Because Callahan was under investigation, the Yeaugers kept Callahan's share of the proceeds from the second larceny. Callahan periodically received small sums from the Yeaugers. When the Yeaugers were transferred to the East Coast, they left the remaining $800 of Callahan's share with petitioner's parents. Petitioner's parents spent the money and later gave Callahan an $800 money order. Tr. 72, 75-76, 145-147.

Sergeant Callahan was detained on the West Coast for a while because he was under investigation, Pet. App. 21a; Tr. 75, 164, but he was later transferred from Camp Pendleton to the enlisted club at the Cherry Point Marine Corps Air Station. The next two larcenies occurred in the spring and summer of 1982 at the New River facilities where petitioner's wife was assigned.

Following a personal dispute with his wife, petitioner reported his wife to the local police and the Naval Investigative Service (NIS) for engaging in lesbian activities. Pet. App. 3a; Tr. 204, 218. That complaint led Naval Investigative Service (NIS) Agent Mozelewski to question Lynne Yeauger on February 25, 1983. During the interview, she confessed that she was involved in the New River larcenies, and she implicated petitioner in both the New River and Camp Pendleton thefts. Tr. 147-148, 218-219, 233; AX 15. On March 22, she gave another statement to the NIS in which she elaborated on her initial confession and stated that Sergeant Callahan was also involved in the Camp Pendleton theft. Tr. 148-149, 241; AX 16.

Based on that information, Agent Mozelewski interviewed Callahan on March 23. Callahan initially denied any involvement in the Camp Pendleton larcenies, but after the agent told him, inaccurately,[3] that the Yeaugers had implicated him as the "ringleader," Callahan confessed that he and petitioner had stolen the money from the Camp Pendleton Club, and he described how the two of them had carried out the crime. Tr. 26-29, 234-235, 237-238. Callahan did not implicate petitioner or petitioner's wife in the North Carolina larcenies.[4] Callahan

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[3] Although petitioner's wife had confessed, petitioner had not, and neither one had said that Callahan was the ringleader.

[4] Callahan was not involved in the New River thefts, which were committed only by the Yeaugers. Tr. 145-146, 207-208.

declined to sign a written statement prepared by Agent Mozelewski, but Callahan said that he might provide the agent with a sworn statement later. Tr. 29, 32, 236.[5]

2. Callahan was tried and convicted of conspiring to steal money from the Camp Pendleton club before petitioner was brought to trial. Callahan testified at his trial. He admitted that he had confessed to Agent Mozelewski and that the agent had accurately recounted the substance of his confession. Callahan claimed, however, that his statement was false. He said that he had lied to the agent because, shortly before the March 23 interview, a stranger had threatened him, his daughter, and his girlfriend. Callahan also testified that the stranger had told him that if he was questioned about the Camp Pendleton thefts, he should tell the NIS that he and petitioner were responsible for them. Pet. App. 4a, 22a.[6]

In light of Callahan's testimony at his own trial, the government moved before petitioner's trial to admit Callahan's March 23 statement to Agent Mozelewski pursuant to Mil. R. Evid. 803(24), the residual hearsay exception.[7] The prosecutor also anticipated that Callahan would testify for the defense in the manner he had testified at his own trial. Tr. 10-11. To ensure that Callahan would be available to testify as a defense witness, the prosecution arranged for a grant of use immunity for Callahan. Tr. 45,

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[5] The confession is AX 5, a statement prepared by Agent Mozelewski summarizing the results of his interview with Sergeant Callahan.

[6] The prosecutor at Callahan's trial testified at petitioner's trial. The prosecutor said that Callahan was asked whether anything in Agent Mozelewski's account of Callahan's statement was inaccurate, and Callahan could not identify any inaccuracies. Tr. 437.

[7] Mil. R. Evid. 803(24) was patterned after, and is identical to, Fed. R. Evid. 803(24).

83, 269; AXs 6, 27.[8] Petitioner objected to the admission of Callahan's March 23 statement on the grounds that the agents had coerced the statement from Callahan, and that Callahan's statement was not admissible under the Rule. See Tr. 79-82. See also AX 10 (defense motion for reconsideration).

The trial judge held a hearing on the motion, at which Agent Mozelewski, petitioner's wife, and Callahan testified. The agent described the circumstances under which Callahan gave his statement and its contents. Tr. 26-29. Callahan admitted that he made the statement and also admitted that, except for certain minor immaterial discrepancies,[9] Agent Mozelewski had correctly recounted what Callahan had said during the interview. Tr. 55, 67. Once again, however, Callahan denied that his March 23 statement was true. He claimed that the agents had coerced the statement from him by threatening him with 20 years' imprisonment if he did not confess and implicate the Yeaugers, and he repeated his claim that he fabricated the story in order to protect himself and his daughter from the stranger's threat. Pet. App. 4a, 17a; Tr. 48-50.[10] Peti-

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[8] Callahan was called by the prosecution at the Article 32 pretrial investigation in this case, but he refused to testify, invoking his privilege against compulsory self-incrimination. Although Callahan had already been tried for the Camp Pendleton larcenies, he had made numerous denials to the NIS during its investigation. If he later testified that he had been involved in those thefts, he arguably could have been prosecuted under Article 107 of the UCMJ, 10 U.S.C. 907, for having made false official statements to the NIS.

[9] Callahan denied only that he had told Agent Mozelewski that petitioner's wife knew about the thefts and that petitioner had purchased the handcuffs. Tr. 67. Petitioner's wife testified that she knew about the thefts in advance and that petitioner did purchase the handcuffs.

[10] Callahan testified that he received an anonymous telephone call four days before the interview. The caller allegedly told Callahan that

tioner's wife also testified, and she corroborated Callahan's confession in various respects.[11]

The trial judge granted the government's motion. The court rejected petitioner's claim that the NIS agents had coerced the statement from Callahan, and the court found that the requirements of Rule 803(24) were satisfied. Tr.

Callahan, his daughter, and his girlfriend would be hurt if Callahan did not cooperate. The caller told Callahan to meet him at a shopping center two days later, on March 21. Callahan said that he met the stranger at the shopping center on that date, and the stranger told Callahan that, when he spoke with the NIS, Callahan should say that he and petitioner committed the Camp Pendleton larcenies. According to Callahan, the stranger also told Callahan how the larcenies were committed. Pet. App. 4a; Tr. 48-50. Callahan admitted, however, that he did not tell the NIS agents about the threat when he spoke with them on March 23. Tr. 51. Apparently, the first time that Callahan brought these alleged threats to the attention of military officials was during his testimony in his defense at his separate trial on the Camp Pendleton larcenies. Pet. App. 4a.

[11] Petitioner's wife testified that she had heard petitioner and Callahan admit to commiting both Camp Pendleton larcenies. Tr. 73. In connection with the first Camp Pendleton theft, petitioner's wife also testified that petitioner bought the handcuffs used in the larceny; that she saw petitioner and Callahan split the proceeds from the larceny at her home; that petitioner admitted that he had handcuffed Callahan to a bathroom pipe; and that petitioner and Callahan said that they had made up the story about the robbery of the club. Tr. 71. In connection with the second Camp Pendleton larceny, petitioner's wife testified that she and petitioner had discussed the theft and purchase of the blowtorch before the theft; that petitioner and his father discussed how best to open the safe with the blowtorch; that petitioner and Callahan practiced using the blowtorch; that after the second larceny Callahan periodically came to the Yeaugers' home to receive a portion of his share of the proceeds; and that the final $800 of Callahan's share was paid to him by petitioner's parents with a money order. Tr. 71-73. Petitioner's wife gave the same testimony at a later pretrial hearing. See Tr. 141-145, 150-151, 162-165.

84-85. In particular, the trial judge found that Callahan's March 23 statement was trustworthy because Callahan's testimony at the hearing was "incredible," Tr. 84, 85, and that Callahan was "a liar. I think he perjured himself here today." Tr. 87. The court, however, refused to admit the written summary of petitioner's statement prepared by Agent Mozelewski, and the court ruled that Callahan's statement could not be admitted at trial until petitioner's wife had testified and corroborated the statement. Tr. 85. The court also later ruled that Callahan's statements were admissible only on the larceny charges (Specifications 1 and 2 of Charge 3), and not on the conspiracy charges (Specifications 2-3 of Charge 2). Tr. 113, 128.

Afterwards, the trial court discussed with counsel the witnesses that each party would call. After the court said that it presumed that petitioner would call Callahan as a defense witness, Tr. 129, the defense claimed that allowing the government to introduce Callahan's statement to the agent without calling him as a witness would prevent the defense from cross-examining Callahan about his statement. *Ibid.* The government replied that it would not object to allowing the defense to cross-examine Callahan as a defense witness, or to having the trial court call Callahan as the court's witness. *Ibid.* When asked whether the defense wanted the government or the court to call Callahan as a witness, defense counsel replied that the government should call Callahan and impeach him, rather than introduce Callahan's statements through Agent Mozelewski. Tr. 130. The trial court said that it would entertain a defense motion to have the court call Callahan as a witness, but that in any event the agent could testify about Callahan's March 23 statement. Tr. 131.

At trial, the government introduced the testimony of petitioner's wife; the government also introduced an

inculpatory remark that petitioner had made to a another serviceman,[12] and the stipulated testimony of two police investigators, who described the crime scene at the Camp Pendleton club. The prosecution did not call Callahan as a prosecution witness, and the defense did not ask the trial court to call Callahan as a witness for the court. Instead, the defense called Callahan as a defense witness. Tr. 273-284. Callahan testified that he was robbed by two masked men on the night of September 21, Tr. 274-275, and that he attended a concert, went to a restaurant, and played cards on the night of the second theft, Tr. 276-279. Callahan also testified that he had confessed to the agent about the crimes, but that his statements were false, that he was threatened with imprisonment if he did not confess, and that he had lied in order to protect himself, his daughter, and his girlfriend from the stranger's threats. Pet. App. 4a; Tr. 280-284, 292-293, 303-310.

ARGUMENT

Petitioner's claim is quite narrow. Petitioner does not argue that Agent Mozewelski inaccurately recounted Callahan's March 23 statement, nor does petitioner contend that Callahan's statement was inadmissible under Mil. R. Evid. 803(24). Instead, petitioner claims that the admission of Callahan's March 23 statement to Agent Mozelewski violated the Confrontation and Due Process Clauses since the government did not first call Callahan as a prosecution witness. The Court of Military Appeals correctly rejected that claim, and its fact-bound decision does not warrant further review.[13]

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[12] Tr. 246. The statement is quoted at Pet. App. 2a-3a n.2.

[13] The Court of Military Appeals made clear that it was not establishing a broad rule of law and that each case must be considered on its own facts. Pet. App. 9a n.7.

Petitioner cannot complain of a Confrontation Clause violation, because the declarant, Callahan, testified at trial. Callahan was subject to defense cross-examination; he admitted that he had made the statement; and he denied that it was true. Under these circumstances, the admission of Callahan's out-of-court statement did not violate the Confrontation Clause. *United States* v. *Owens,* 108 S. Ct. 838, 843 (1988) (an inquiry whether an out-of-court statement has adequate indicia of reliability is unnecessary "when a hearsay declarant is present at trial and subject to unrestricted cross-examination"); *Nelson* v. *O'Neil,* 402 U.S. 622, 626-627 (1971); *Douglas* v. *Alabama,* 380 U.S. 415, 420 (1965). Nor can petitioner claim that he was prejudiced by the fact that he was required to call Callahan as a defense witness. The trial court said that it would consider calling Callahan as a court witness, but petitioner declined the offer. And in any event, petitioner was permitted to cross-examine Callahan as if he had been called as a government witness. While there may be a minor tactical benefit to the defense from forcing the prosecution to call a declarant, that benefit is not one that is protected by the Confrontation Clause. See *United States* v. *Inadi,* 475 U.S. 387, 394-397 (1986).

Quite apart from that fact that Callahan testified at trial, his statement was admissible over a Confrontation Clause objection because it was "supported by a 'showing of particularized guarantees of trustworthiness.' " *Lee* v. *Illinois,* 476 U.S. 530, 543 (1986), quoting *Ohio* v. *Roberts,* 448 U.S. 56, 66 (1980). First, there is no room for doubt that Callahan gave the March 23 statement or that Agent Mozewelski accurately recounted what Callahan said. Callahan testified that he made the statement and that the agent accurately reported it, and petitioner does not argue to the contrary. Second, the trial court found

that Callahan's explanation for recanting his March 23 statement was so patently contrived that it supported, instead of undermining, the truth of his March 23 statement, Tr. 84-87, and both military appellate courts agreed with that finding. Pet. App. 8a-9a, 17a n.4, 27a.[14] Third, petitioner's wife testified at trial, and her testimony strongly corroborated Callahan's statement. Callahan's statement was incriminating because Callahan said that he and petitioner had committed the Camp Pendleton thefts and because he described how the crimes were committed. See Tr. 234-235. Petitioner's wife gave a very similar account of the events in her testimony at trial, Tr. 203-207, as the military appellate courts unanimously found, Pet. App. 2a-3a, 18a, 22a. In fact, the court of military review concluded that "[t]he testimony of * * * [petitioner's] wife * * * was, for all practical purposes, identical to Callahan's statement," Pet. App. 18a, and that finding is amply supported by the record.[15] Accordingly, in light of

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[14] As the court of military review explained: "We concur completely with the military judge's estimate of SGT Callahan's credibility as it relates to the recantation of his confession. The 'cloak-and-dagger' web of intrigue spun by SGT Callahan is patently incredible and unworthy of belief. The 'tale' of mystery, in fact, defies belief. We consider the recantation, as well as the testimony of SGT Callahan on the motion, to be the epitomic lie. His recantation testimony was such a farcical assault on basic ideas of veracity that it, though offered to explain away his confession, served instead to support its truth. The credibility of the NIS agents was, as previously noted, supported by SGT Callahan, for he admitted that he indeed related to the agents those facts to which they testified. Thus, the military judge properly considered the credibility of the witnesses and their declarations—both at the time of their making and at the time of trial—as factors in determining the trustworthiness of the hearsay declaration." Pet. App. 27a.

[15] Consistent with her testimony at the pretrial hearings, petitioner's wife testified that petitioner left their home on September 21, at 2:30

the fact that Callahan testified at trial and in light of the indicia of reliability accompanying Callahan's statement, the admission of that statement did not violate petitioner's rights under the Confrontation Clause.

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a.m. and returned with Callahan at approximately 5:30 a.m.; that, when he returned, petitioner said that he and Callahan stole money from the club; that she, petitioner, and Callahan split up the proceeds of the theft; and that petitioner and Callahan "were talking about how [petitioner] had handcuffed [Callahan] to the pipes in the bathroom." Tr. 204-205, 215. Lynne Yeauger also testified that petitioner and Callahan discussed the second theft; that petitioner and his father discussed how best to open the safe; that petitioner purchased a blowtorch to open the safe; and that petitioner and Callahan returned on the night of October 19 with the money from the second theft. Tr. 205-207, 216. Petitioner's wife also described how Callahan's share of the proceeds was paid out. Tr. 207.

Other evidence also corroborated Callahan's statement. See Pet. App. 18a (discussing police reports that described the two crime scenes and evidence that petitioner's parents gave Callahan a check for $800); Tr. 245 (testimony of Sergeant Rothrock describing the safe that had been opened with a blowtorch); Tr. 249 (stipulated testimony of Helen Bryant that she saw Callhan receive a check that petitioner said was for Callahan from petitioner's parents); Tr. 295-296, 298-299 (Callahan admitted that he had received $800 from petitioner's parents, but described the money as a "loan," even though there were no terms, no repayment date, and no repayments had been made for a year).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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